



DEPARTMENT OF DEFENSE

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Office of the Secretary

32 CFR Part 165

Docket ID: DOD-2009-OS-0030

RIN: 0790-AI45

Recoupment of Nonrecurring Costs (NCs) on Sales of U.S. Items

AGENCY: Office of the Under Secretary of Defense (Comptroller)/Chief Financial Officer, DoD.

ACTION: Final rule.

SUMMARY: This rule updates policy, responsibilities, and procedures for calculating and assessing NC recoupment charges on sales of items developed for or by the Department of Defense to non-U.S. Government customers. All costs related to the sale of the items are fully reimbursable by the non-U.S. Government.

EFFECTIVE DATE: This rule is effective [INSERT 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Claire Nelson, 703-602-0250.

SUPPLEMENTARY INFORMATION:

Executive Summary

I. Purpose of the Regulatory Action

This rule updates policy, responsibilities, and procedures to conform with sections 2761(e)(1)(B), 2761 (e)(2), and 2767(b) of Title 22, United States Code (U.S.C.) (also known as “sections 21(e)(1)(B), 21(e)(2), and 27(b) of the Arms Export Control Act, as amended”) for

calculating and assessing NC recoupment charges on sales of items developed for or by the Department of Defense to non-U.S. Government customers.

II. Summary of the Major Provisions of the Regulatory Action In Question

This rule provides guidance for reviewing NC waiver requests; clarifies when NC calculations are used; clarifies the types of DoD agreements covered; and provides additional waiver authorities.

III. Costs and Benefits

All costs related to the sale of the items are fully reimbursable by the non-U.S. Government customers. The Department of Defense does not incur cost nor receive profit for the items sold. The non-U.S. Government customers benefit from the sale of the items from the Department of Defense. The NC amount collected in 2010 and 2011 was \$4.8 and \$9.6 million, respectively. On average it is roughly \$7.2 million annually.

Public Comments

The Department of Defense published a proposed rule on November 4, 2011 (76 FR 68376-68378). No comments were received on the proposed rule.

The Department has made a few additional changes in the final rule. Reference citations were updated. Definitions were updated or added for clarification. This final rule provides guidance for reviewing NC waiver requests; clarifies when NC calculations are used; clarifies the types of DoD agreements covered; and provides additional waiver authorities.

Regulatory Procedures

Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563

“Improving Regulation and Regulatory Review”

It has been certified that 32 CFR part 165 does not:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in these Executive Orders.

Sec. 202, Pub. L. 104-4, "Unfunded Mandates Reform Act"

It has been certified that 32 CFR part 165 does not contain a Federal mandate that may result in expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.

Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)

It has been certified that 32 CFR part 165 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not if promulgated, have a significant economic impact on a substantial number of small entities.

Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

It has been certified that 32 CFR part 165 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, "Federalism"

It has been certified that 32 CFR part 165 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

- (1) The States;
- (2) The relationship between the National Government and the States; or
- (3) The distribution of power and responsibilities among the various levels of Government.

List of Subjects in 32 CFR Part 165

Armed forces, Arms and munitions, Government contracts

Accordingly 32 CFR Part 165 is revised to read as follows:

PART 165– RECOUPMENT OF NONRECURRING COSTS (NCs) ON SALES OF U.S. ITEMS

Sec.

165.1 Purpose.

165.2 Applicability.

165.3 Definitions.

165.4 Policy.

165.5 Responsibilities.

165.6 Procedures.

165.7 Waivers (including reductions).

Authority: 22 U.S.C. 2761(e)(1)(B); 22 U.S.C. 2761 (e)(2); and 22 U.S.C. 2767(b)

§165.1 Purpose.

This part updates policy, responsibilities, and procedures to conform with 22 U.S.C. 2761(e)(1)(B), 2761 (e)(2), and 2767(b) (also known as “sections 21(e)(1)(B), 21(e)(2), and 27(b) of the Arms Export Control Act, as amended”) for calculating and assessing NC recoupment charges on sales of items developed for or by the Department of Defense to non-U.S. Government customers.

§165.2 Applicability.

(a) This part applies to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to collectively as the “DoD Components”).

(b) This part does not apply to sales of excess property when accountability has been transferred to property disposal activities and the property is sold in open competition to the highest bidder.

§165.3 Definitions.

The following definitions apply to this part.

Blanket waiver. An NC recoupment charge waiver that is not related to a particular sale; for example, waivers for all sales to a country or all sales of a weapon system.

Cooperative projects. Defined in 22 U.S.C. 2767(b).

Cost pool. The total cost to be distributed across the specific number of units, normally the number of units produced plus those planned to be produced. The nonrecurring research, development, test, and evaluation cost pool comprises the costs described in the definition for nonrecurring research, development, test and evaluation costs in this section. The nonrecurring production cost pool comprises costs described in the definition for nonrecurring production costs.

Foreign military sale. A sale by the U.S. Government (U.S.G.) of defense items or defense services to a foreign government or international organization pursuant to 22 U.S.C. Chapter 39.

Major defense equipment. Any item of significant military equipment on the United States Munitions List having a nonrecurring research, development, test, and evaluation cost of more than 50 million dollars or a total production cost of more than 200 million dollars. The determination of whether an item meets the major defense equipment dollar threshold for research, development, test, and evaluation shall be based on DoD obligations recorded to the date the equipment is offered for sale. Production costs shall include costs incurred by the Department of Defense. Production costs for the foreign military sales program and known direct commercial sales production are excluded.

Model. A basic alpha-numeric designation in a weapon system series (e.g., a ship hull series, an equipment or system series, an airframe series, or a vehicle series). For example, the AN/TPQ-36(V)2 and the (AN/TPQ-36(V)10 are different models in the same radar system series.

Nonrecurring production costs. Those one-time costs incurred in support of previous production of the model specified and those costs specifically incurred in support of the total projected production run. Those NCs include DoD expenditures for preproduction engineering; special tooling; special test equipment; production engineering; product improvement; destructive testing; and pilot model production, testing, and evaluation. That includes costs of any engineering change proposals initiated before the date of calculations of the NC recoupment charge. Nonrecurring production costs do not include DoD expenditures for machine tools, capital equipment, or facilities for which contractor rental payments are made or waived in accordance with the Defense Federal Acquisition Regulation Supplement¹.

Nonrecurring research, development, test and evaluation costs. Those costs funded by a research, development, test, and evaluation appropriation to develop or improve the product or

¹ Available at <http://www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html>

technology under consideration either through contract or in-house DoD effort. This includes costs of any engineering change proposal started before the date of calculation of the NC recoupment charges as well as projections of such costs, to the extent additional effort applicable to the sale model or technology is necessary or planned. It does not include costs funded by either procurement or operation and maintenance appropriations.

Pro rata recovery of NCs. Equal distribution (proration) of a pool of NCs to a specific number of units that benefit from the investment so that a DoD Component shall collect from a customer a fair (pro rata) share of the investment in the product being sold. The production quantity base used to determine the pro rata calculation of major defense equipment includes total production.

Significant change in NCs recoupment charge. (1) A significant change in an NC recoupment charge occurs when:

- (i) A new calculation shows a change of 30 percent of the current system NC charge.
- (ii) The NC unit charge increases or decreases by 50,000 dollars or more, or
- (iii) Where the potential for a 5 million dollar change in recoupment exists.

(2) The total collections may be estimated based on the projected sales quantities. A significant change occurs when potential collections increase or decrease by 5 million dollars.

Special research, development, test, and evaluation and nonrecurring production costs. Costs incurred under a foreign military sale at the request of, or for the benefit of, a foreign customer to develop a special feature or unique or joint requirement. Those costs must be paid by the customer as they are incurred.

§165.4 Policy.

It is DoD policy that:

(a) The NC recoupment charge shall be imposed for sales of major defense equipment only as required by an Act of Congress. The USD(P), through the Defense Security Cooperation Agency, may grant a waiver to recoupment charges in accordance with in accordance with this part and DoD Directive 5105.65.”²

(b) The NC charges shall be based on the amount of the Department of Defense nonrecurring investment in an item.

§165.5 Responsibilities.

(a) Under Secretary of Defense (Comptroller)/Chief Financial Officer (USD(C)/CFO)) shall provide necessary financial management guidance to the Department of Defense regarding the recoupment of NC.

(b) The Under Secretary of Defense for Acquisition, Technology, and Logistics shall take appropriate action to ensure the Defense Federal Acquisition Regulation Supplement remains in accordance with this part.

(c) The USD(P) shall:

- (1) Monitor the application of this part.
- (2) Review and approve NC recoupment charges.
- (3) Review and approve NC recoupment charge waiver requests received from foreign countries and international organizations for foreign military sales.
- (4) Oversee publication of a listing of items developed for or by the Department of Defense to which NC recoupment charges are applicable.
- (5) Use the guidance in §165.7 of this part to review NC waiver requests.

(d) The Secretaries of the Military Departments and the Directors of the Defense Agencies shall:

² Available at <http://www.dtic.mil/whs/directives/corres/pdf/510565p.pdf>

(1) Determine the DoD nonrecurring investment in items developed for or by the Department of Defense and perform required pro rata calculations in accordance with this part and financial management guidance from USD(C)/CFO when a military equipment asset type is considered a candidate for sale.

(2) Validate and provide recommended charges to the USD(P). Retain supporting documentation until the item has been eliminated from the NC recoupment charge listing.

(3) Review approved NC recoupment charges on a biennial basis to determine if there has been a change in factors or assumptions used to compute a NC recoupment charge and, if there is a significant change in a NC recoupment charge, recommend the change to USD(P) for review, approval, and publication in DSCA 5105.38-M, “Security Assistance Management Manual (SAMM).”³

(4) Collect charges on foreign military sales, in accordance with DoD 7000.14-R⁴.

(5) Deposit collections to accounts as prescribed by the USD(C)/CFO.

(6) Request guidance from the USD(P), within 90 days after determining that an issue concerning an NC recoupment charge cannot be resolved.

§165.6 Procedures.

(a) The NC recoupment charge to be reimbursed shall be a pro rata recovery of NCs for the applicable major defense equipment (MDE). Recovery of NC recoupment charges shall cease upon the recovery of total DoD nonrecurring investment costs. Such charges shall be based on a cost pool as defined in §165.3. For an MDE system that includes more than one component, a “building block” approach (i.e., the sum of NC recoupment charges for individual components) shall be used to determine the NC recoupment charge for the sale of the entire system.

³ Available at <http://www.dsca.osd.mil/samm/>

⁴ Available at <http://www.defenselink.mil/comptroller/fmr/>

(b) The NC recoupment charge shall not apply when a waiver has been approved by USD(P), in accordance with §165.7, or when sales are financed with USG funds made available on a non-repayable basis. Approved revised NC recoupment charges shall not be applied retroactively to accepted foreign military sales agreements.

(c) When MDE is sold at a reduced price due to age or condition, the equipment's NC recoupment charge shall be reduced by the same percentage reduction.

(d) The full amount of costs for "special" research, development, test, and evaluation and nonrecurring production costs incurred for the benefit of particular customers shall be paid by those customers. However, when a subsequent purchaser requests the same specialized features that resulted from the added "special" research, development, test, and evaluation and nonrecurring production costs, a pro rata share of those costs may be paid by the subsequent purchaser and transferred to the original customer if those special NCs exceed 50 million dollars. The pro rata share may be a unit charge determined by the DoD Component as a result of distribution of the total costs divided by the total production. Unless otherwise authorized by USD(P), special research, development, test, and evaluation and nonrecurring production costs will not be collected after 10 years have passed since the date the original FMS customer accepted the FMS Letter of Offer and Acceptance(LOA) that included the special NC charges.. The USG shall not be charged any NC recoupment charges if it adopts the features for its own use or provides equipment with such features under a U.S. grant aid or similar program.

(e) Cooperative DoD agreements, to include co-production, co-development and cooperative development agreements, shall use the policy in this part to determine the allocation basis for recouping the participant investment costs from third-party purchasers. Each respective DoD

agreement shall bind all parties to the agreement to comply with the policies in this part regarding third party sales and for the distribution of recouped funds among the parties.

§165.7 Waivers (including reductions).

(a) Title 22, U.S.C. 2761(e)(1)(B) requires the recoupment of a proportionate amount of NCs of MDE from foreign military sales customers.

(b) Pursuant to 22 U.S.C. 2761(e)(2)(A), a waiver or reduction in the NC for a specific sale may be made if the sale will significantly advance U.S. Government interests in:

- (1) Standardization with the North Atlantic Treaty Organization.
- (2) Standardization with Australia, Israel, Japan, New Zealand, or the Republic of Korea in furtherance of mutual defense treaties with one or more of those countries.
- (3) Foreign procurement in the United States under a co-production agreement.

(c) In accordance with 22 U.S.C. 2761(e)(2)(B), a waiver may be made if:

- (1) Imposition of an NC recoupment charge likely would result in the loss of the sale; or,
- (2) The sale is for an MDE also being procured for the Military Services, and will result in DoD unit cost savings that substantially offset the revenue foregone by waiving the recoupment charge because the total quantity of purchased equipment caused a reduction in the unit cost.

(d) In accordance with 22 U.S.C. 2761(e)(2)(C), any increase in a NC charge previously approved as appropriate may be waived for a particular sale if the increase results from a correction of an estimate of the production quantity base that was used for calculating the charge.

(e) Requests for waivers should originate with the foreign government and shall provide information on the extent of standardization to be derived as a result of the waiver.

(1) Blanket waiver requests should not be submitted and shall not be considered.

(2) A waiver request shall not be considered for a sale that was accepted without an NC recoupment charge waiver, unless the acceptance was conditional on consideration of the waiver request.

(3) Requests for waivers shall be processed expeditiously, and approved or disapproved by USD(P) within 60 days of receipt. A waiver in whole or in part of the recoupment charge or a denial of the request shall be provided in writing.

DATED: May 21, 2013.

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OSD Federal Register
Liaison Officer
Department of Defense

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